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IN THE

Supreme Court of the United States

October Term, 1968
No. 1103

JAMES A. GAINEY and J. L. YOUNG, Individually and on Behalf of Others Similarly Affected,

Petitioners

v.

THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES AND THE PENNSYLVANIA RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A, infra, pp. 17-19) is not yet reported; and its denial of reargument is printed as Appendix B, infra, p. 20; the opinion of the District Court is reported at 275 F. Supp. 292 and is Appendix C herein, pp. 21-58.

JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was entered on November 27, 1968. The Order denying rehearing was entered on December 27, 1958. The Jurisdiction of this Court is invoked under 28 U.S.C. (1254(1)).

STATUTES INVOLVED

Pertinent sections of the Railway Labor Act are printed as Appendix D.

QUESTIONS PRESENTED

1. Where a statutory representative serves a section six notice under the Railway Labor Act with the object of renegotiating a current collective bargaining agreement, and the Brotherhood's General Chairman testifies that he reached an agreement with the carrier to increase the pay of petitioners so that it would equal that of other workers, in another area, doing the same work, while the carrier's officer testifies that no such agreement was reached, but that he offered the Brotherhood another agreement which he said the Brotherhood rejected, which would have eliminated discrimination in pay, and the carrier refuses to put into effect the agreement which the General Chairman testifies had been reached, and terminates the collective bargain in force, and the Brotherhood refuses to seek injunctive relief to prevent the carrier from abrogating the existing agreement, and both fails to continue negotiations or seek the aid of Mediation under the Railway Labor Act, thus causing the petitioners to earn less money than fellow workers doing the same work, is not this arbitrary action and discrimination by the Brotherhood prohibited by the Railway Labor Act?

2. Are not the petitioners entitled to a mandatory injunction against their Brotherhood to compel it to continue negotiations with the carrier or invoke the mediation machinery under the Railway Labor Act to resolve this wage dispute?

STATEMENT

The petitioners ask for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit which affirmed the District Court's finding, after a trial without a jury, that the Brotherhood defendant was not guilty of hostile discrimination in this *unfair representation* suit.

This is a class action on behalf of 600 railroad workers known as tallymen, ninety percent of whom are Negroes, against their statutory representative, The Brotherhood of Railway and Steamship Clerks, etc., for failing to perform its statutory duty.

At all times pertinent to this case, the plaintiffs were employed in the Eastern Region of the Pennsylvania Railroad, the area from New York and Philadelphia to Pittsburgh, Pennsylvania. Two other regions existed: The Central, which covered the operations between Pittsburgh and Chicago, Illinois; and the Western, which covered the area west of Chicago to California.

In 1937 the defendant Brotherhood affiliated with a company union of the Pennsylvania Railroad which represented the plaintiffs; it was called "The Association of Railroad Clerical Employees." The same company union officials continued to represent the Petitioners after the affiliation.

In 1941 the Brotherhood entered into a collective bargaining agreement with the Pennsylvania Railroad with re-

spect to tallymen in the Central Region *only*. The agreement placed tallymen on monthly salaries and gave them fringe benefits such as paid sick leave and vacations. The carrier and the defendant Brotherhood, however, did not make the same provisions for Eastern Region tallymen, who continued to work at hourly rates, with no fringe benefits, and as it was learned at the trial, earned about $60 per month less than their Central Region counterparts. The situation in the Western Region is unknown and unimportant for the purposes of this suit.

On the Eastern Region about fifteen percent of the tallymen were operating under an incentive program called the "Tonnage Agreement" which in effect rewarded speed in handling freight; thus a small percentage earned more than their counterparts in both the Eastern and Central Regions. But workers in these "crews" (tallymen & truckers) were dissatisfied and asked their union representatives to seek uniformity in pay scales. After nine years of negotiations, the Brotherhood's General Chairman, who had been one of the company union officers brought into the defendant Brotherhood after the 1937 affiliation, served a section six notice under the Railway Labor Act (45 U.S.C. 156) in which he indicated a desire to renegotiate pay rates for work "crews." When the Eastern Region tallymen learned that their counterparts in Pittsburgh were earning more money than they, agitation then was for uniformity of pay between the two regions.

On April 18, 1950, the Brotherhood General Chairman orally agreed with a carrier official to give Central Region salaries to tallymen for the Eastern Region. The consideration for this agreement was that the Brotherhood

would agree to the elimination of the "tonnage agreement". As was the custom, the General Chairman confirmed this understanding in writing on April 21, 1950.

But the Pennsylvania Railroad never placed the April 18, 1950 agreement into effect. At the trial, a retired railroad official was brought in to deny that an agreement was entered into by the Brotherhood's General Chairman and another railroad official. Despite the fact that the General Chairman under cross-examination admitted that he did enter into an oral agreement on April 18, 1950, the District Court found *no* such agreement had been made.

This same railroad witness told the court that in 1950 when the General Chairman demanded Central Region wages for tallymen in the Eastern Region, he counteroffered with the suggestion that there be established three monthly rates of pay, depending upon the size of the freight station for *both* regions. He said that the General Chairman rejected this counteroffer.

In 1952 Congress amended the Railway Labor Act permitting union shop agreements; immediately after which this carrier and Brotherhood entered into such an agreement, thus compelling every worker embraced in the crafts covered by this Brotherhood, including the tallymen, to belong to the Brotherhood or lose his employment.

In 1952 the Pennsylvania Railroad proceeded to close the Philadelphia Freight Transfer station where the "tonnage agreement" had been in effect, thus eliminating the incentive pay program that fifteen percent of the petitioners were earning; and thus abrogating the agreement

which had been the subject of the section 6 notice served on it by the Brotherhood.

The Brotherhood not only failed to seek injunctive relief to prevent the carrier from abrogating an existing agreement contrary to the commands of the Railway Labor Act, but it failed to compel the carrier to put into effect the 1950 agreement to give Eastern Region tallymen salaries comparable to the Central Region.

In January of 1953 the Petitioners along with more than 4000 other members of the Brotherhood in the Eastern Region, voted to withhold per capita tax to the Brotherhood until it acted on the many grievances (including the subject of this suit) filed against the Brotherhood and carrier, many of which had been hanging fire since 1944. The Grand Lodge of the Brotherhood retaliated swiftly by revoking the charters of the locals in which tallymen had membership and succeeded in sustaining their revocation by an action in the courts of Pennsylvania. *Grand Lodge v. Girard Lodge, etc. et al.*, 384 Pa. 246 (1956).

At the trial of the instant case, the General Chairman testified that he kept the grievances of the tallymen in suspense, awaiting the outcome of the revocation suit.

The General Chairman also testified that he was incensed by the carrier's unilateral termination of the "tonnage agreement" and its failure to place into effect the equalization of pay agreement dated April 18, 1950. Asked why he did not seek to *mediate* the problem under the Railway Labor Act, his reply was that an attorney in the office of George M. Harrison, Grand Brotherhood President, advised him that the issue was moot; and that the matter therefore should not be mediated.

Statement

To this day tallymen on the Eastern Region are still paid at an hourly rate and receive less money than their Central Region counterparts.

The revocation action in the state courts was terminated in July 1956 and the plaintiffs continued pleading for action on the part of the Brotherhood.

After waiting three more years the plaintiffs commenced their first federal action against the carrier and Brotherhood. *Gainey v. Pa. R.R.*, 177 F. Supp. 421 (1959), aff'd 3 Cir. 1960, 275 F. 2d 342, cert. denied 363 U.S. 811, 80 S. Ct. 1248, 4 L. ed. 1153.

The action was dismissed without a trial, on a motion to dismiss under F.R.C. P. 12(b), despite the admonition of this Court in *Steele v. Louisville,* 323 U.S. 192, and a line of cases which follow, up to January 14, 1969. *Glover v. St. Louis-San Francisco Railway Co.*, No. 38 October Term, 1968, 37 L.W. 4084.

Another similar complaint was filed by the same plaintiffs, charging the carrier and Brotherhood with conspiracy to defraud them and of violating the Railway Labor Act. Again the defendants filed motions to dismiss under Rule 12(b); and again the Courts obliged, 199 F. Supp. 477; 313 F. 2d 318.

In this, the third action, stayed against the carrier, but continued as to the Brotherhood, a motion to dismiss was denied under 12(b). Three years later it went to trial (a motion for a jury trial having been denied), before a visiting Judge from the Middle District of Pennsylvania.

Though the trial lasted four days in January 1966, it took the trial Judge 21 months to make findings. He dismissed the Complaint, finding that the Brotherhood was innocent of any wrongdoing; was not guilty of hostile discrimination; and that laches prevented the plaintiffs from having an injunction issued to compel the Brotherhood to mediate this wage dispute in accordance with the mandate of the Railway Labor Act.

The Third Circuit in affirming the District Court merely held that plaintiffs failed to prove hostile discrimination. It did not rule on the vital issue of whether plaintiffs were entitled to injunctive relief.

Thus the plaintiffs who have lost to date more than five million dollars in earnings, not including interest and possible penalties, have no relief in the courts, and none under the Railway Labor Act, since only a carrier and a statutory representative may invoke the mediation machinery under the Act.

REASONS FOR GRANTING THE WRIT

1. The Standards for Testing the Prohibited Discrimination

Both the lower court and the Circuit Court of Appeals have failed to apply the standards of prohibited discrimination by a statutory representative as enunciated by this Court in a line of cases commencing with *Steele v. Louisville & N. R. Co.*, 323 U.S. 192, 89 L. ed. 173, 65 S. Ct. 226, and ending with *Glover v. St. Louis-San Francisco Railway Co.*, No. 38 October Term, 1968, 37 L.W. 4084 (January 14, 1969).

In *Steele* this Court said:

> "We hold that the language of the Act to which we have referred, read in the light of the purposes of the Act, expresses the aim of Congress to impose on the bargaining representative of a craft or class of employees the duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, *without hostile* discrimination against them." (202-3)

Applying the *Steele* doctrine to unions coming within the ambit of The National Labor Relations Act, this Court expanded the meaning of hostile discrimination prohibited by Congress; thus in *Vaca v. Sipes*, 386 U.S. 171, 17 L. Ed. 2d 842, 87 S. Ct. 903 (1967), this Court said:

> ". . . the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility *or* discrimination toward any, *to exercise its discretion with complete good faith* and *honesty,* and *to avoid arbitrary conduct.*" (177)

In 1957 this Court admonished this respondent Brotherhood of Railway Clerks in *Conley v. Gibson, General Chairman of the Brotherhood of Railway Clerks, etc. et al.,* 355 U.S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99:

> "We need not pass on the Union's claim that it was not obliged to handle any grievances at all because we are clear that *once it undertook to bargain or present grievances for some of the employees* it represented *it could not refuse to take similar action in good faith for other employees* just because they were Negroes." (47)

The evidence was overwhelming that the petitioners did not enjoy good relations with the upper echelon officers of this Brotherhood.

Letters were placed into evidence revealing that the petitioners accused this Brotherhood of continuing company unionism by stalling on claims and grievances filed by them against the Pennsylvania Railroad.

Evidence at the trial revealed that millions of dollars of claims had not been acted upon for unknown reasons, compelling the petitioners to employ private attorneys to finally collect on them.

One of the largest grievances was the subject of this suit, and when the petitioners voted not to pay per capita

taxes to the Grand Lodge of this Brotherhood, it retaliated with the revocation of the charters of the locals in which the petitioners had membership.

Despite this overwhelming evidence of animosity between the petitioners and the Grand Lodge, the lower court found no *hostile discrimination.* Even if *that* were the limited standard, the evidence was sufficient to draw the conclusion that the Brotherhood discriminated hostilely. It seemed to the lower court that because no hatred or heat was generated from the testimony of the Brotherhood's General Chairman, there was therefore no hostile discrimination.

But giving monthly salaries to Central Region tallymen, and lower hourly rates to Eastern Region tallymen is discrimination. Permitting a carrier to terminate an existing incentive pay program for fifteen percent of the petitioners, after a section 6 Notice (Sec. 156) under the Railway Labor Act was served for the purpose of renegotiating the wage agreement for tallymen, is discrimination; for it had the duty to prevent such a unilateral termination by applying to the courts for an injunction. This the Brotherhood did not do. Entering into an agreement to give wages to Eastern Region tallymen comparable to those being paid to Central Region tallymen would have eliminated discrimination. By not enforcing this agreement, and permitting the Pennsylvania Railroad to continue paying lower hourly rates to Eastern Region tallymen is the rankest type of discrimination. By refusing to invoke the machinery of mediation as provided by the Act (Sec. 183) to resolve this wage dispute (knowing that the petitioners under the Act had no power to invoke the Act without their statutory representative) is discrimination.

The fact that all these things were done in a cold impersonal fashion does not make them any the less hostile. Hostility has to be read into these unfair practices. What other motivation could this Brotherhood have other than punishment of the petitioners for calling it and its officers *company union.*

As the Eighth Circuit said in *Thompson v. Brotherhood,* 316 F. 2d 191 (1963):

> "A union has no more justification to discriminate injuriously in its representation on the ground of nonmembership, or instability of membership or even because of persistent and vocal complaints or other obnoxious behavior, than it has to discriminate on account of skin pigmentation."

At the trial this Brotherhood had the burden of proving *good faith* and *honesty* in the exercise of its discretion; and that its *conduct was not arbitrary. Vaca v. Sipes,* supra. But the Grand President, George M. Harrison, did not appear at the trial; nor did his house counsel, who, Mr. Loehr, the Brotherhood General Chairman, said had advised him not to take this wage dispute to mediation because the issue was moot.

How could two different wage scales for the same work be moot. Was not that an arbitrary decision? Was that made in good faith? Was that the exercise of honest discretion?

The lower Court simply found no hostile discrimination. And the Third Circuit Court of Appeals affirmed, relying on its narrow concept of the prohibited discrimination as it defined it in *Gainey v. Brotherhood,* 313 F. 2d

318 (1963): "The common thread running throughout these opinions is the improper, usually bad faith, motivation for the course taken." (p. 324)

At the trial a railroad official testified that during the section six negotiations for the Eastern Region tallymen he offered the Brotherhood uniform salaries for all tallymen in both the Eastern and Central Regions. He testified that he wanted to create three monthly salaries depending upon the size of the freight station for both Regions. This would have eliminated the invidious discrimination between the two regions and created a relevant discrimination permitted by *Steele*. This railroad official testified that the Brotherhood rejected this offer. Assuming this official was testifying truthfully, was not the rejection of an offer to eliminate the existing lower pay scale on the Eastern Region an *arbitrary* act, the exercise of *bad faith* discretion? This the lower court ignored as did the Third Circuit.

---

2. Injunctive Relief

Ever since *Steele* this Court has held that a worker is entitled to injunctive relief against a statutory representative to compel it to do its duty under the Act. In the instant case the lower Court refused to issue an injunction against the respondent Brotherhood to compel it either to reopen negotiations with the Pennsylvania Railroad or invoke mediation under the Railway Labor Act to resolve this wage dispute. It accomplished this by

holding *laches* barred the petitioners from this relief. In doing so it boldly chose to ignore the decision of this Court in *Conley,* supra. "Collective bargaining is a continuing process." It chose to ignore the holding of the Fifth Circuit, thus creating a conflict between it and that Circuit. In *Brotherhood of Loc. Firemen v. Mitchell,* 190 F. 2d 308, the Court said:

> "We agree with appellees that the obligation imposed by statute upon defendant to fairly represent the plaintiffs and to actively negotiate and contract in their interest is a continuing one and that, insofar as the suit undertakes, by a claim for injunctive relief in respect of it, to hold defendants to the performance of that obligation, *limitations* does not run against it.
>
> "This is bound to be so, because as the right and duty to negotiate is always open, so the right to compel new negotiations to remedy injustice created by, or not dealt with in, prior negotiations, is always open." (313)

This Court took note of the lack of power in the individual worker in the field of grievance processing when it said in *Vaca:*

> "To leave the employee remediless in such circumstances would, in our opinion, be a great injustice. We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract."

Reasons for Granting the Writ

Thus in *Vaca* this Court would permit an employee to obtain injunctive relief if his union refused to invoke the arbitration machinery provided in the collective bargain. Contrary to this view, the lower court here would leave the workers remediless, sanctioning the unlimited power of a union to arbitrarily refuse to mediate a wage dispute as mandated by the Railway Labor Act.

The lower court and the Third Circuit Court of Appeals were "clearly erroneous in their findings". *United States v. United States Gypsum Co.*, 333 U.S. 364. The lower court applied the limited doctrine of "hostile discrimination" incorrectly, and refused to apply the broadened *Vaca* holding which prohibits *arbitrary union action, bad faith discretion, hostility or discrimination.*

CONCLUSION

For all of the above reasons Petitioners believe a Writ of Certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Third Circuit

OPINION OF THE COURT
(Filed November 27, 1968)

Per Curiam:

This is an appeal from an order of the District Court for the Eastern District of Pennsylvania denying post trial motions by plaintiffs-appellants, former employees of The Pennsylvania Railroad Company. Appellants brought this action in the district court pursuant to the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C. §151 et seq., against The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (hereinafter "Brotherhood").[1] They sought certain injunctive and declaratory relief as well as damages for breach of the duty of fair representation.

[1] When appellants initiated this action in February, 1963, they sued the Pennsylvania Railroad Company as well as the Brotherhood. Both defendants subsequently succeeded in obtaining a stay of proceedings until appellants paid the costs of prior proceedings against them. Appellants paid the costs to the Brotherhood, but not to the Railroad, and there have been no further proceedings against the Railroad.

The district court found, *inter alia,* that the Brotherhood did not act in bad faith and was not guilty of "hostile discrimination" in failing to obtain Central Region rates of pay for Eastern Region tallymen, or in failing to seek injunctive or other relief provided by the Railway Labor Act under the circumstances of the closing of the Philadelphia Transfer Freight Station. Having found an absence of hostile discrimination in the Brotherhood's dealings with and representation of the appellants, the district court quite properly refused to hold that the Brotherhood breached its duty of fair representation. See Gainey v. Brotherhood of Railway & Steamship Clerks, 313 F. 2d 318 (C.A. 3, 1963).

The central issue on this appeal is whether the district court "clearly erred" in finding an absence of hostile discrimination. As stated by the Supreme Court in United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948):

> "* * * A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

See also, Valdesa Compania Naviera, S.A. v. Frota Nacional de Petroleiros, 348 F. 2d 33 (C.A. 3, 1965); Robert H. Fox Co. v. Keystone Driller Co., 232 F. 2d 831 (C.A. 3, 1956).

We have carefully reviewed the entire record in this case in light of the *Gypsum* rule, and we are constrained

to hold that the district court's finding was not clearly erroneous.[2]

Accordingly, the order of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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[2] In view of our disposition of this appeal we need not reach either appellants' request for a mandatory injunction or the issue of the applicable statute of limitations (or laches).

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Third Circuit

SUR PETITION FOR REHEARING

Present: Hastie, Chief Judge, and McLaughlin, Kalodner, Staley, Freedman, Seitz, Van Dusen, Aldisert and Stahl, Circuit Judges.

The petition for rehearing filed by Appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
Francis L. Van Dusen
Judge

Dated: December 27, 1968

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

OPINION

[275 F. Supp. 292]

FINDINGS OF FACT, CONCLUSIONS OF LAW AND OPINION

Sheridan, Chief Judge, Middle District of Pennsylvania, Sitting by Special Designation:

This is an action pursuant to the Railway Labor Act, 44 Stat. 577, as amended, 45 U.S.C.A. §151 et seq. by plaintiffs, former employees of The Pennsylvania Railroad Company (Railroad), against the Railroad and against The Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees (Brotherhood), for damages for breach of the duty of fair representation, and for certain injunctive and declaratory relief. The court has jurisdiction of the subject matter and the parties.

This is the third action plaintiffs have brought in this court against the defendants. The first complaint, filed on March 26, 1959, was dismissed against the Brotherhood because plaintiffs failed to plead the exhaustion of

their remedies within the Brotherhood or an adequate reason for failure to do so. Gainey v. Brotherhood of Railway & Steamship Clerks, E.D. Pa. 1959, 177 F. Supp. 421, aff'd 3 Cir. 1960, 275 F. 2d 342, cert. denied, 363 U.S. 811, 80 S. Ct. 1248, 4 L. Ed. 2d 1153. The second complaint, filed on June 17, 1960, was dismissed against the Brotherhood for failure to plead hostile discrimination. Gainey v. Brotherhood of Railway & Steamship Clerks, E.D. Pa. 1961, 199 F. Supp. 421, aff'd 3 Cir. 1963, 313 F. 2d 318. But complaints were also dismissed against the Railroad. After the present action was started on February 19, 1963, the Brotherhood and the Railroad obtained a stay of proceedings until the plaintiffs paid the costs of the first two actions. Plaintiffs paid the costs to the Brotherhood, but not to the Railroad, and there have been no further proceedings against the Railroad. Subsequently, the Brotherhood filed a motion to dismiss the present complaint for a number of reasons, one of which was that "the complaint does not sufficiently allege bad faith or hostility toward the group for which plaintiffs purport to speak." By order filed on May 18, 1964, the late Judge Allan K. Grim denied the motion. In an accompanying opinion D.C., 230 F. Supp. 678, Judge Grim concluded that the following paragraphs of the complaint, which were not pleaded in either of the prior actions, satisfied the requisite allegation of a breach of the debt of fair representation grounded on bad faith and ill will.

"XV

> "The defendant union, contrary to the Railway Labor Act, is hostile toward the membership of the Philadelphia locals, where the bulk of the herein tallymen are located because of the latter's opposition

toward the General Chairman and the staff of the union's System Board and the Internation [sic] President and the staff of the Grand Lodge of the union.[1]

"XXIII

"The defendants acting individually and in concert by acts of omission and commission planned a course of conduct designed to discriminate against Eastern Region Tallymen so that their pay scale would be approximately twenty-five dollars a month less than tallymen employed in the Central Region of the carrier; and this discrimination was agreed upon as a means of punishing the plaintiffs and other members of the defendant union in the Eastern Region for their opposition to the union leadership; * * *"

The trial was to the court without a jury. Since plaintiffs' proof of damages obviously would involve protracted and extensive discovery and require testimony from an unusually large number of witnesses, only the issue of the Brotherhood's liability was tried. Rule 42(b), Fed. R. Civ. P.

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[1] Plaintiffs' brief suggested a second motive: "In 1952 the carrier terminated the tonnage at the Philadelphia Transfer and Loehr got nothing for it. The logical inference to be drawn is that Loehr accepted the closing of the station in 1952—two or three months before this union and the Pennsylvania Railroad entered into a union shop agreement, which forced 23,000 railroad workers in this craft to pay homage to this union for as long as the workers remained on their jobs. It could very well be that this was the consideration for allowing the carrier to close the station without receiving any quid pro quo for the workers by way of equalization of rates. The consideration for the closing of the Transfer flowed to the union coffers—not in the pay envelopes of the Tallymen on the Eastern Region."

Plaintiffs were tallymen employed at the Philadelphia Transfer Station (Philadelphia Transfer) in the Philadelphia Terminal Division, a part of the Railroad's Eastern Region, which generally included the stations East of Altoona, Pennsylvania. In 1937 the Brotherhood obtained the collective bargaining rights for their craft, which also included truckers and loaders. Plaintiffs' principal charges of discrimination are:

1. In 1941, the Brotherhood negotiated a wage agreement for Eastern Region tallymen based on hourly rates plus incentive pay. Tallymen in the Central Region (stations West of Altoona to Chicago) were on salary which netted them about $42.27 a month more, and, in addition, received vacation pay and sick leave, which were not payable to hourly rate workers.

2. In January of 1949, the Brotherhood served the Railroad with a Section 6 notice under the Railway Labor Act, together with a proposal for a new wage agreement which eliminated certain wage inequities between tallymen and truckers and loaders under the 1941 agreement, and then failed to seek an injunction when the Railroad terminated the existing agreement.

3. On April 18, 1950, the Brotherhood negotiated a new wage agreement for all tallymen in the Eastern Region and failed to enforce it.

4. The Brotherhood permitted the Railroad to close Philadelphia Transfer in June of 1952, thereby terminating the existing wage agreement, without seeking injunctive relief under the Railway Labor Act, which would have preserved the status quo pending negotiation, mediation, arbitration and Presidential intervention.

The Brotherhood is the largest of the railroad unions, representing crafts on more than 99 percent of the railroads in the United States and Canada. It adapts itself, geographically and organizationally, to the railroad so that it has a unit corresponding to each unit in the railroad. In 1950-52. the Brotherhood had 100 lodges of employees of The Pennsylvania Railroad. Each lodge had a Protective Committee headed by a chairman (local chairman). The members of Lodge 100, one of five lodges in the Philadelphia Terminal Division, were employees of Philadelphia Transfer. When there were two or more lodges in a division, the lodge chairmen elected a Division Chairman. The System Board of Adjustment, of which all Division Chairmen were members, elected the General Chairman, who since 1941 has been S. V. W. Loehr. The national headquarters of the Brotherhood, called the Grand Lodge, is at Cincinnati. The Grand President was George M. Harrison until he retired in 1963. He had a staff which in 1950-52 included two Vice Grand Presidents, F. H. Hall and G. B. Goble; Mr. Kinley, of the grievance and agreements section, and Mr. Crawford, counsel.

Grievances were adjusted at the lowest level of the Brotherhood and its railroad counterpart, with the right of appeal to the next highest level, as follows:

Brotherhood	*Railroad*
Local Chairman	Freight Agent
Division Chairman	Division Superintendent
General Chairman	Regional General Manager

A grievance reached the General Chairman either by a "joint submission," i.e., an agreed statement of facts and the contentions of the two parties, prepared by the Divi-

sion Chairman in consultation with the Division Superintendent, or by an "ex parte" statement of the Division Chairman when the Division Superintendent refused to sign a joint submission. The General Chairman was required to list it on the agenda for the next monthly meeting, or advise the Division Chairman it had no merit, giving his reasons. The Division Chairman had the right to appeal to the appropriate committee of the System Board. If the General Chairman were reversed, he was required to present the grievance to the General Manager. If the General Chairman were sustained, the Division Chairman or the claimant could appeal to the Grand President, and from the Grand President to the Grand Executive Council. The General Chairman could recommend that a grievance rejected by the General Manager be taken to the Third Division of the National Railroad Adjustment Board, a federal agency. If the Grand President approved, it would then be briefed and argued and decided in what is termed an "award." Generally, the negotiation of new contracts or the changing of contract provisions was the responsibility of the General Chairman or his staff when only Pennsylvania Railroad employees were concerned. It was the responsibility of the Grand President and his staff when the employees of other railroads were also concerned. Thus, Loehr, as General Chairman, was responsible for representing member crafts not only of the Railroad's Philadelphia Terminal Division, but of all divisions of the Railroad, while the Grand President's office was concerned with employees of the various crafts on all the railroads who were members of the Brotherhood.

The parties have been in litigation for many years. The principal figures have been Loehr, the General Chair-

man, and Joseph P. Zawada, Division Chairman of the Philadelphia Terminal Division, and also Local Chairman of Lodge 100. Zawada had 6500 men under him. He served as Division Chairman from 1942 until 1954, and from February 1954 until July 1956 he acted jointly with J. C. McGuigan, Acting Division Chairman, under the terms of a court order. In addition to the above actions, two other proceedings are relevant. On February 5, 1954, the Grand Lodge, having revoked the charters of four lodges of the Philadelphia Division (including Lodge 100) for failure to transmit the per capita tax of the members, filed a complaint in equity in the Common Pleas Court of Philadelphia for an order requiring the lodges to surrender all their books, records and funds to the Grand Lodge. The lower court found for the defendants and reinstated the charters of the four lodges. The Supreme Court of Pennsylvania reversed the order of reinstatement and granted the requested relief. Grand Lodge, Brotherhood of Railway & Steamship Clerks v. Girard Lodge 100, 1956, 384 Pa. 248, 120 A. 2d 523. In 1951 the Grand President instructed the two Vice Grand Presidents to go to Philadelphia and make:

> "* * * a full and complete investigation of all of the files of both Brothers Zawada and Loehr pertaining to all pending and unsettled grievances referred to above, and to determine the status of each respective grievance and whether the method and procedure adopted by both Brothers Zawada and Loehr, and their handling thereof, are in conformity with the grievance procedure under the prevailing agreements on this Railroad and the Brotherhood's Protective Laws. * * *"

After hearing, the Vice Presidents on January 25, 1952, reported to the Grand President that the delays were generally attributable to Zawada. The Grand President gave Zawada an opportunity to reply, which he did in considerable detail on April 29, 1953. The matter ended here. The full record of this proceeding, including the report of the Vice Presidents and Zawada's reply, was admitted in evidence in this trial.

One of the activities at Philadelphia Transfer was the transfer of less than carload freight from one freight car to another for forwarding to destination. This work was performed by "gangs" consisting of a tallyman, a loader and truckers. The tallyman checked the freight against shipping documents as it was removed from the first car. Under a 1941 agreement negotiated by the Brotherhood and the Railroad, tallymen were paid higher wages than loaders or truckers. Pay was computed on an hourly basis with an incentive known as "tonnage." Incentive was payable to tallymen when the tonnage handled in a day by a gang exceeded 35.14 tons (70,280 pounds). The tonnage rate was 14 cents, computed by dividing the normal daily wages of $4.92 (61½ cents per hour by 8 hours) by the minimum tonnage of 35.14. Thus, in addition to his normal daily wage of $4.92, a tallyman received 14 cents for every ton over 35.14 tons handled in a day.

Loaders and truckers received a lower hourly rate than tallymen, and were required to handle more tonnage to receive incentive pay. The various rates and tonnage as originally established were:

	Hourly Rate	*Tonnage Rate*	*Tons Handled Before Incentive Was Effective*
Tallymen	.615	.14	35.14
Loaders	.60	.1144	42
Truckers	.58	.4425	42

While in years subsequent to 1941 the hourly rates were adjusted, no changes were made in the tonnage requirements.

The tonnage arrangement was unsatisfactory. Zawada began to get complaints as soon as he assumed office in 1942. Truckers and loaders were dissatisfied with the lower rates, and the higher tonnage. There were inequities among the various gangs in the opportunity to earn tonnage. Gangs assigned to mail order shipments with its many and small packages going to divers destinations could not handle 35 tons in a day. Gangs assigned to heavier freight, such as canned goods, pipe, or structural steel, could exceed 35 tons. Also, items such as steel and pipe were handled by a crane, whereas most other items were handled by hand. Finally, the inequities were complicated because one might be a tallyman one day and a loader the next. These inequities were a source of agitation and brought about charges of favoritism in the allotment of work.

Tallymen at Philadelphia Transfer learned that tallymen at Trenton received higher tonnage rates, and agitated for equalization. Later, they learned that Central Region tallymen, especially those in Pittsburgh, were on salary and received higher monthly income, and vacation and sick pay, which they did not receive, and agitated for the

same. Loaders and truckers, on the other hand, agitated for equalization of tonnage with the tallymen. Not all tallymen were dissatisfied since about fifteen percent earned tonnage and some members of the crane gangs earned as much as the superintendent. Loehr undertook to revise the 1941 agreement as it applied to Philadelphia Transfer and the 52nd Street Station.[2] On July 21, 1948, he forwarded Zawada a copy of a proposed agreement, to be effective March 1, 1949, with the request that he review it with the membership. This agreement attempted to rectify some of the inadequacies of the 1941 agreement; it reduced the tonnage for truckers and loaders to 35.14 tons, and set up machinery to eliminate favoritism and other problems, but did not provide for the equalization of pay and benefits for the Eastern Region tallymen with those of the Central Region. Zawada approved and the proposal was submitted to management, which on August 17, 1948, met with the Brotherhood to discuss it. Management suggested that the 52nd Street Station be put under the jurisdiction of another agent and that tonnage be eliminated. Loehr replied that management was

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[2] In 1941 the 52nd Street Station handled only a small amount of platform tonnage and was under the jurisdiction of the Agent at Philadelphia Transfer. It was the practice to send a gang from Philadelphia Transfer to 52nd Street Station for a few hours a day to handle the tonnage. The same tonnage rates were in effect at both stations. In subsequent years the 52nd Street Station tonnage greatly increased so that it attained a separate identity as a freight transfer point, but Brotherhood members were subject to the same tonnage formula that applied to Philadelphia Transfer. 52nd Street was considered a desirable station because the freight there was heavy and cranes were in use more than at Philadelphia Transfer.

working at cross purposes since the Brotherhood had already proposed a new tonnage agreement. Following the meeting Zawada, who had attended, expressed concern about management's intended changes at 52nd Street. Zawada requested that at the next meeting on September 14, 1948, Loehr "submit as a counter proposal a request that the tonnage agreement be made to cover Federal Street, South Philadelphia Freight, Walnut Street Freight, Kensington District and Broad & Washington Avenue Freight Station and stations under jurisdiction of said Agent. This will keep them in conference long enough to let well enough alone. We have to do this because what the Carrier is trying to do is eliminate tonnage at a cream point (52nd Street) which will aggravate the membership at that point. I will further consult with you on Tuesday." Thus, at this point Zawada, while undoubtedly still concerned with the inequalities in the tonnage agreement, was interested in continuing them rather than in changing to Central Region rates.

On January 21, 1949, the Brotherhood served the Railroad with a Section 4 notice under the Railway Labor Act in which it proposed to abrogate the tonnage agreement of 1941, and substitute the new tonnage agreement which had been approved by Zawada. At a meeting on February 15, 1949, attended by Zawada, the proposal was discussed item by item and management took it under consideration. There were several subsequent meetings but no agreement was reached. Management resisted the changes in the proposal and the Brotherhood resisted any change at 52nd Street. On February 21, 1950, Loehr demanded either a formal acceptance or a counter proposal. On April 7, 1950, the Railroad formally rejected the pro-

posal, requested that tonnage also be eliminated at Philadelphia Transfer and suggested that the matters be discussed following the next regular meeting on April 18, 1950. These arrangements were made and Loehr advised Zawada and invited him to submit his suggestions prior to the meeting. There is a dispute as to what transpired on April 18, 1950. The Brotherhood's version is that: the regular meeting was held between 10:00 a.m. and 12:12 p.m. in room 298 of the 30th Street Station in Philadelphia and was attended by Loehr, Zawada and others for the Brotherhood, and Mr. Alexander, Eastern Region Superintendent of Labor and Wages, and other railroad officials, not including Mr. Stewart, Eastern Region Superintendent of Stations and Transfers; only regular grievances and claims and a joint study of Philadelphia ticket offices were discussed; tonnage was not discussed; during the lunch hour after the meeting Loehr chanced to meet Stewart on the main floor of the 30th Street Station and at that time Stewart asked Loehr if he would agree to abolish tonnage at the Philadelphia Transfer; Loehr replied that he would for a price—the extension of Central Region rates at the Pittsburgh 11th Street Station to tallymen all over the Eastern Region; Stewart was agreeable but indicated the approval of his superiors was required; Mr. Nancarrow, Eastern Region General Manager, was the only one who had the authority to approve the proposal; Loehr immediately communicated the proposal to Zawada who called a meeting of the Philadelphia Terminal Grievance Committee which gave its approval; Loehr then called Alexander's office to inform him that the proposal had been made because Alexander, as well as Stewart, was an advisor to Mr. Nancarrow; Alexander was

absent but Loehr spoke with the chief clerk who stated that it would go through if his superiors approved.

Plaintiffs argue that the offer was made by Stewart at the regular meeting, that Alexander was present and that he and Stewart had the authority to and did enter into a binding oral agreement, which was confirmed by Loehr in a letter to Nancarrow on April 21, 1950. This version is based largely on the testimony of Zawada.

Mr. Alexander testified that on the afternoon of April 18, 1950, and not at the regular meeting, the substance of the lunch hour conversation between Stewart and Loehr was discussed in his office by Loehr and Kershaw for the Brotherhood and Stewart and Alexander for the Railroad. At that time Stewart did not indicate that he had approved Loehr's proposal. Alexander agreed to take it under consideration. Loehr did not remember this meeting, but did not deny that it may have taken place.

The testimony of Loehr, Alexander, Stewart and J. C. McGuigan, the Brotherhood's Assistant General Chairman for the Eastern Region, support the Brotherhood's version. The minutes of the regular meeting, prepared by McGuigan, consisting of six closely typed pages, list those present, the various subjects discussed, each of which had a docket number, and quote statements of the participants. Stewart is not recorded as present, and there is no reference to tonnage or to Stewart or to his proposal. Plaintiffs stress acceptance of their version only on the basis that everybody but Zawada perjured himself at the trial. The Brotherhood's version is more credible. The Stewart proposal was made at the lunch hour meeting when Al-

exander was not present; it was not made at the regular meeting.

[1] That there was neither an offer or binding agreement is clearly indicated by subsequent events. In a letter to Loehr on April 19, 1950, Zawada spoke of "this proposed change," and of certain clarifications and alternatives, particularly with respect to paid holidays. On April 21, 1950, Loehr wrote to Nancarrow, not to Alexander or Stewart, outlining the proposal, which Loehr referred to as a "suggestion," to drop tonnage and to substitute the Central Region salary of $269.17 a month plus benefits. The letter concluded: "Will you please advise if you concur." Nancarrow did not reply until October 10, 1950, when he wrote Loehr: "In our opinion, the question of eliminating the tonnage rates of pay at the Philadelphia Transfer should not be involved, in the handling of Tallymen's rates of pay all over the entire Eastern Region, and such matters should not be handled as concurrent subjects."

Until the closing of Philadelphia Transfer, Loehr continually sought advice from the office of the Grand President on whether the Brotherhood should strike, seek mediation under the Act, or take other steps to force the Railroad to act. He was advised to continue to negotiate. On November 7, 1950, he formally rejected Nancarrow's reply of October 10, 1950, and called for acceptance of the April 21 proposal. Although on many occasions Loehr sought a reply, none was given. Alexander testified that after the April 18, 1950, meeting, the Railroad explored the Brotherhood's proposal to apply Central Region rates to the Eastern Region. It found that there was not just

one Central Region rate, but a variety of them, about nine, and Loehr was attempting to obtain the highest to apply to all tallymen, regardless of the station size; that this would prove extremely costly to the Railroad; and that as a result, the Railroad lost interest. In the meantime, the Railroad determined that Philadelphia Transfer was not needed as a freight transfer point and decided to close it effective June 30, 1952.

[2] On June 12, 1952, after Zawada had been notified that the Railroad intended to close Philadelphia Transfer, he wrote Loehr to *"proceed with negotiations in connection with the proposed adjustment of tonnage rates and/or the equalization of Tallymen's rates at the Philadelphia Transfer, Philadelphia Terminal Division and the Eastern Region."* (Emphasis supplied). In a separate letter of the same date, he advised Loehr that during a June 10, 1952, meeting between Brotherhood representatives and the Railroad's General Manager's staff, he, Zawada, advised Railroad personnel that upon the closing of Philadelphia Transfer, the Railroad would be confronted with many claims because: "(a) The July 19, 1941, Tonnage Agreement *was not terminated by either party and is still in effect.* Under terms of that Agreement, a 30-day notice must be given either to amend, adjust, or terminate the agreement. (b) For the past several years, General Chairman S. V. W. Loehr and/or the staff, together with responsible officers of the Pennsylvania Railroad Company were negotiating a tonnage rate for the Philadelphia Transfer. They were further negotiating a proposed equalization of rates involving Tallymen, not only at the Philadelphia Transfer, but the Philadelphia Terminal Division and the Eastern Region. These

conferences or negotiations were not concluded and are still a pending issue between both parties." (Emphasis supplied.) These letters show clearly that Zawada was aware, as late as June 1952, that the adjustment of tonnage rates or the equaiization of the rates for tallymen were only "proposed" matters which were under "negotiation." "Negotiation is a process of submission and consideration of offers until an acceptable offer is made, and accepted". United States v. John McShain, Inc., 1958, 103 U.S. App. D.C. 328, 258 F. 2d 422, 424.

On July 21, 1952, Loehr reported to Zawada that the Railroad had advised, "Since this facility was abandoned effective with the close of business, June 29, 1942 [sic], before any agreement concerning the tonnage rates of pay at Philadelphia Transfer was reached, further negotiation would serve no useful purpose, and we are, therefore, closing our files." The System Board Executive Committee directed Loehr to seek the advice of the office of the Grand President. Loehr conferred with both Kinley and Crawford of the Grand President's staff, who thought the matter should be dropped. In their opinion the Railroad had a right to close Philadelphia Transfer and since the tonnage agreement affected primarily that location and the 52nd Street Station, and was tied in with the equalization of pay proposal, the question was moot.

In the meantime, Zawada filed claims for those affected by the closing because he believed that the Railroad had no right to abandon Philadelphia Transfer and that the tonnage agreement was still in effect. Many of the men formerly employed at that location "followed the work" to other divisions, and Zawada was directed to

cease pursuing claims for these men who were now under the jurisdiction of other division chairmen. Although Zawada contacted the other division chairmen, the claims were not pursued. Thus, only the men under Zawada's control continued to agitate in connection with these pay matters.

In January 1954, four of the unions under Zawada's control held a mass meeting of some 900 men. Tonnage and other grievances were discussed. G. R. Kershaw, Senior Vice General Chairman and next in authority to Loehr, and a member of the System Board of Adjustment, advised the meeting that the Railroad would not agree to the changes because they considered them too costly. The four lodges decided that the Brotherhood was not processing their grievances satisfactorily and voted to cease paying "per capita taxes" to the Grand Lodge and System Board. Whereupon, their charters were revoked, and the revocation was upheld by the Pennsylvania Supreme Court in its decision of February 6, 1956.

The standards by which the duty of fair representation are to be measured are set forth in the opinion of Judge McLaughlin in the second Gainey case—Gainey v. Brotherhood of Railway & Steamship Clerks, 313 F. 2d 318, supra:

> "* * * [A] union which possesses the power to act for all employees of a bargaining unit has the corresponding duty to represent all the members of the unit fairly, impartially and in good faith, without 'hostile discrimination' against any of them. * * * In order to come within its ambit, the complaint * * * must have more than conclusory statements alleging

> discrimination. In particular plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravamen of the rule is 'hostile discrimination.' * * * [T]hat certain conduct of the Brotherhood or a condition permitted to exist by it is 'invidious' and 'discriminatory', without a concomitant identification of lack of good faith, will not set forth a claim * * *."

The rate differential between the Eastern and Central Regions did not constitute hostile discrimination. About 15% of the tallymen were making tonnage and had no complaint. For a time the rates in the Central Region were generally higher. When they became higher and by how much is not clear. There is evidence that in 1941 tonnage was eliminated in the Central Region in favor of monthly salaries. The proposal to the Railroad in 1949, which had the approval of Zawada and the Local Committee, was to eliminate irregularities between tallymen and loaders and truckers in the Eastern Region and not to apply Central Region rates. Moreover, at about this time, in 1949 or 1950, there is a question, as far as this record is concerned, whether there was much of a difference, if any, between Central and Eastern rates. The uncontradicted testimony is the Railroad also wanted tonnage eliminated. Alexander, Loehr and Zawada so testified. There was an allegation in the complaint that the tonnage agreement proved costly to the Railroad. Zawada was questioned on how it could be costly without at the same time being favorable to the plaintiffs. Both his and Alexander's testimony indicate plaintiffs might have made more money under tonnage in the later years than under

Central Region rates.[3] Tallymen may have wanted a monthly salary even if it did not amount to more money

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[3] "Q. [The Court] May I interrupt you? I don't quite understand this. It has been admitted in this case, I think, that the railroad wanted the tonnage agreement abrogated.

A. [Zawada] Yes.

* * * * * * * *

Q. They wanted it changed. Now, you have said in your complaint, and I repeat again, that the tonnage agreement proved costly. I just want to know how was the tonnage agreement costly to the railroad.

A. About that time, the inception of the mechanical devices known as chore boys—they are mechanical platform devices where instead of a 2-wheeled hand truck, the trucker would have at least two in the gang and you would load your freight on this mechanical device and drive it instead of pulling, and with the tonnage rates being in force, even as they were with these mechanical devices, the railroad was of the opinion that it would run them more money, because they were using mechanical devices to expedite the handling of the freight, and at the same time paying tonnage rates, and they felt that if they eliminated tonnage in its entirety, they could use these mechanical devices, chore boys they call them, and handle the freight. They were of the opinion, and tests were made, and they brought in these chore boys, and they were putting them two in a gang, in some of the gangs.

Q. This statement that the tonnage agreement proved costly to the railroad means only one thing to me, unless it is explained. It must have meant that they were paying more money to the tallymen.

A. They were paying more money to the tallymen, and they would be paying more money to the loaders and truckers and the men that made the tonnage.

Q. Then is the reason for that statement that the tonnage agreement proved more costly because they paid more money to the loaders and truckers and not to the tallymen? I don't know whether I make myself clear, but I want to know the answer

because of the fringe benefits. But even Zawada was willing to forego this if he could not get it for the truckers and

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to this question: How did the tonnage agreement prove costly to the railroad insofar as the tallymen are concerned?

A. The only answer I could give you is what I outlined, with the exception of those chore boys, that they would have to—more gangs would maintain tonnage, and the carrier had to pay for the purchase of the equipment, the maintenance of the equipment, and then the earnings would be greater, and they felt by the elimination of tonnage they would save that money. Therefore, the tonnage agreement, with the inception of these mechanical devices, would prove more costly to them, and that is why they wanted to abrogate the tonnage agreement.

Q. Did the railroad think that it would prove more costly because they would have to pay more money to the tallymen?

A. Well, they would have to pay more on a tonnage basis, if they made more tonnage.

Q. Weren't the tallymen better off then with the tonnage agreement than with the so-called equalization agreement?

A. No. The tallymen in most instances would rather be placed on a monthly rate because here you would have a guaranteed monthly rate to get that money in.

Q. All right. I understand. That would be the reason they would want it.

A. That's right.

Q. I am now talking about the difference in money here. In your opinion, if this tonnage agreement had continued, we will say the Philadelphia Terminal station was still in existence, because of these new mechanical devices, would not the tallymen have been making more money than they were making in the Central Division under the salary arrangement, even though maybe that was not as desirable, for other reasons which you have just mentioned?

A. They would be making more money, though with the use of the mechanical device, they would be making more money. Whether they would make more than the monthly rate, that I couldn't tell you because that would be on a monthly basis. They

loaders as well. In his April 19, 1950, letter to Loehr, he said:

> "A further understanding in connection with the paid holidays—it is clearly understood that if the tallymen are to receive payment for holidays, the miscellaneous employees will also be entitled to same. If you are unable to obtain this, then we are better off allowing the matter to remain status quo as far as the holiday situation is concerned."

This may be an additional explanation for Zawada's suggestion to Loehr on September 14, 1948, that he submit a counter proposal to extend tonnage to other stations in the Philadelphia Division.

[3] Plaintiffs insist that Loehr's letter of April 21, 1950,[4] to Nancarrow constitutes a contract, although this

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would get that guarantee, but I would assume that there would be more days that they would make tonnage by the use of the equipment and thereby increasing their capacity.

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Q. [Brotherhood's Counsel] What did you do after that proposal was made?

A. [Alexander] * * * and I think we lost all interest in the matter at that time because the big saving in tonnage rates would have been at Philadelphia Transfer, if we were to get any at all. So we just dropped it, and that was the end of it."

[4] "Dear Sir:

This refers to your letter of April 7, 1950 which is in connection with our letter of January 21, 1949 filing formal notice in accordance with the procedures of the Railway Labor Act and our initial meeting held on February 15, 1949 with respect to our desire to abrogate the Agreement of July 24, 1941 with respect to tonnage rates of pay applicable to certain positions at the Philadelphia Transfer, Philadelphia Terminal Division, and to

was rejected by the Court of Appeals in the opinion written by the late Judge Goodrich in the first Gainey appeal:

> "There is an additional reason why plaintiffs' basic claim against the Railroad must fall. That cause of action is based solely on a contract. According to the complaint, that contract is embodied in a letter written by the General Chairman of the Brotherhood's Pennsylvania Railroad System Board of Adjustments to W. L. Nancarrow, General Manager of the Railroad's eastern region, under date of April 21, 1950. * * *
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substitute in lieu thereof a new Agreement to be effective as of March 1, 1949.

We quote from your letter:

> 'We have given very careful consideration to your proposal in this matter; and, in view of the pronounced decrease in the total amount of tonnage handled, and because of the changed present day conditions, at the Philadelphia Transfer, we are of the opinion that it would be of mutual benefit to both Management and the Employes if the tonnage rates were eliminated entirely at this location.'

In accordance with our discussion at our meeting in Philadelphia, Pa., on April 19, 1950, we are agreeable to your suggestion. This is based on our understanding that the rate of pay for Tallymen in the Eastern Region will be changed to the same rate of pay that is in effect in the Central Region, that is $269.17 a month, and further, that the same considerations attendant to such monthly-rated employes in the Central Region will be granted these employes. We suggest that this entire arrangement be made effective as of May 1, 1950.

Will you please advise if you concur.

Yours truly,
s/S. V. W. Loehr
General Chairman"

> "We think no amount of discovery, deposition or other procedural device can make this letter into a contract. The district judge described it as 'a mere offer or, possibly, a counter offer,' 177 F. Supp. at page 428. We are sure it is no more than that and would be inclined to say it is simply an invitation for further comment from the Railroad official to whom it is addressed. It is perfectly clear that an interpretation of a writing is for the court. An examination of this writing reveals plainly that it is not an acceptance under general principles of contract law or under the decisions of Pennsylvania courts in which state this letter was composed, mailed and received. We reiterate that no amount of discovery can turn a letter which on its face is not a contract into one." (Footnotes omitted.)

Even if this letter and the surrounding circumstances did spell out a contract, plaintiffs misconceive the effect of a failure to enforce. The issue is bad faith, not a mistake in judgment and not negligence. Failure to enforce, without more, would not constitute liability. Likewise, it is uncontradicted that in negotiating after the Section 6 notice was served and after Philadelphia Transfer was closed, Loehr acted on the advice of his superiors and counsel. The failure to seek an injunction or other relief provided by the Railway Labor Act, under the circumstances, is not hostile discrimination. Gainey v. Brotherhood of Railway & Steamship Clerks, 313 F. 2d 318, 324, supra. Vaca v. Sipes, 1967, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 2d 842, was a suit against the union for breach of a duty of fair representation in handling a grievance. Plaintiff had been discharged because of poor health, a

fact which plaintiff disputed. The union processed the grievance through several steps, but then became convinced the medical evidence did not support plaintiff and declined to proceed to arbitration. In reversing a verdict for the plaintiff, the Supreme Court said at pages 189 and 192, 87 S. Ct. at pages 916 and 918:

> "Quite obviously, the question which the Missouri Supreme Court thought dispositive of the issue of liability was whether the evidence supported Owens' assertion that he had been wrongfully discharged by Swift, regardless of the Union's good faith in reaching a contrary conclusion. This was also the major concern of the plaintiff at trial: the bulk of Owens' evidence was directed at whether he was medically fit at the time of discharge and whether he had performed heavy work after that discharge.
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> "For these same reasons, the standard applied here by the Missouri Supreme Court cannot be sustained. For if a union's decision that a particular grievance lacks sufficient merit to justify arbitration would constitute a breach of the duty of fair representation because a judge or jury later found the grievance meritorious, the union's incentive to settle such grievances short of arbitration would be seriously reduced. The dampening effect on the entire grievance procedure of this reduction of the union's freedom to settle claims in good faith would surely be substantial. Since the union's statutory duty of fair representation protects the individual employee from arbitrary abuses of the settlement device by

providing him with recourse against both employer (in a §301 suit) and union, this severe limitation on the power to settle grievances is neither necessary nor desirable. Therefore, we conclude that the Supreme Court of Missouri erred as upholding the verdict in this case solely on the ground that the evidence supported Owens' claim that he had been wrongfully discharged."

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Plaintiffs introduced other evidence to show a pattern of discrimination.

[4-6] *National Wage Increases.*[5] There were national wage increases in 1937, 1941 and 1944. The increases were in cents per hour and presented difficulties when applied to a tonnage agreement. The 1941 and 1944 increases were handled by Loehr and the General Superintendent and were eventually paid. There is a dispute whether the 1937 increase was paid. Loehr was in the Central Region at the time and it was paid there, and he assumed it was paid in the Eastern Region. Za-

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[5] "MR. OLMSTED: Objection. Even the amended complaint does not refer to the 1937 increase. It only refers to the 1941 and the two later ones. * * *

MR. RICHETTE: Are you finished, sir?

MR. OLMSTED: Yes. I object to any evidence concerning 1937 on that additional ground.

MR. RICHETTE: Your Honor, my burden is to prove discrimination, and the basis for the claims for failure to incorporate increases in tonnage go back to 1937, and that is all the reason I am offering it, not as an issue, Your Honor.

THE COURT: Overruled."

In his reply brief plaintiffs' counsel argued that the 1937 increase was a principal issue.

wada testified it was not paid, but admitted that in the counter-claim filed in the charter revocation proceedings, item (b) listed failure of the Brotherhood to process claims for the 1941 and 1944 increases but not for the 1937 increase. He said this was an oversight on his part. Plaintiffs called six retired tallymen, in addition to Zawada, as witnesses. One, Smith, testified that he had filed a claim for $1,700 for retroactive pay. He answered one question: "Well, I expect I did at the time, but I can't remember just now because my memory is awful poor. I can't hardly remember the way home." Another, Slocum, said he did not know if he was owed retroactive pay. The others, including Young, a plaintiff, were not asked the question. Plaintiffs suggest no reason for non-enforcement of the increase except the general charge of discrimination. Payment of the 1941 and 1944 increases is not consistent with non-payment of the 1937 increase, which came before there was any agitation over tallymen's wages and long before the union shop. Plaintiffs have not met their burden of proof. There is insufficient evidence to find that the 1937 increase was not paid. *The Butler Street Agreement:* After the Philadelphia Transfer was closed, the Railroad built a new freight station on Butler Street, Philadelphia. The Universal Carloading Company transferred its freight business there from stations of the Reading Railroad. This created seniority problems with employees of the Pennsylvania Railroad, Reading Railroad and Universal Carloading Company, all demanding seniority, which obviously could not be attained. An agreement was negotiated between the Brotherhood and the three employers under which the seniority of all employees was dovetailed. Plaintiffs were so en-

raged they called the mass meeting of January 28, 1954. While both Loehr and Zawada naturally wanted to secure an agreement favorable to the employees under their jurisdiction, so did the respective Brotherhood officials of Reading and Universal Carloading employees. The Brotherhood owed a duty of fair representation to all three. If either the demand of Zawada, interested only in Philadelphia Terminal Division employees, or Loehr, interested only in employees of Pennsylvania, was met, a large number of Reading and Universal Carloading employees would have been frozen out. As stated by the Supreme Court of the United States in Ford Motor Co. v. Huffman, 1953, 345 U.S. 330, 338, 73 S. Ct. 681, 686, 97 L. Ed. 1048:

> "The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion.
>
> "Compromises on a temporary basis, with a view to long range advantages, are natural incidents of negotiation. Differences in wages, hours and conditions of employment reflect countless variables. Seniority rules governing promotions, transfers, layoffs and similar matters may, in the first instance, revolve around length of competent service. Variations acceptable in the discretion of bargaining representatives, however, may well include differences based upon such matters as the unit within which seniority is to be computed, the privileges to which it shall relate, the nature of the work, the time at which it is done, the fitness, ability or age of the employees,

their family responsibilities, injuries received in course of service, and time or labor devoted to related public service, whether civil or military, voluntary or involuntary."

Award 4291: This was the case of 58 women employed at Philadelphia Transfer whose jobs were discontinued and the work given to a private contractor. Loehr processed the claims successfully from Zawada's level to the National Railroad Adjustment Board, Third Division, which in 1949 gave claimants an award. The Railroad refused to pay so an action to force payment was started by Grand President Harrison and Loehr in the United States District Court for the Western District of Pennsylvania. The case never came to trial because it was compromised by private counsel engaged by the claimants who were dissatisfied with the delay. Pretrial motions had been filed and there was a serious backlog in the Western District. There is no proof that the Brotherhood attempted to delay the trial.

Award 4292: This is a companion case to No. 4291. The Railroad employed a private contractor to do the work of tallymen, truckers and loaders. Again, Loehr processed the claims from Zawada's level to the National Railroad Adjustment Board, Third Division, and obtained an award. The persons entitled to recover and the amounts were to be determined by the Brotherhood and the Railroad. The task was difficult because payroll records of the private contractor were unavailable. They could not reach an agreement. Loehr testified that although he requested the necessary information, Zawada never gave it to him. In his reply to the findings of the two Vice Presidents Zawada explained that meetings were arranged with the financial

secretary of each lodge, with the local chairman of each lodge, and after the claimants were ascertained, the names were forwarded to the local committees for each claimant to certify to the time lost. There was much correspondence between Loehr and Zawada since the task was time consuming. Finally, a joint committee was appointed to determine whether the claimants submitted could be "considered available under provisions of the decision rendered by the Third Division." After nine months the joint committee submitted separate reports. The claimants again obtained private counsel who brought suit against the Railroad and the Brotherhood. The suit was compromised by the Railroad. The delay in collection cannot be attributed to the Brotherhood.

There is not a shred of evidence that the decision in 1952 not to invoke the National Railway Labor Act had any connection with the union shop agreement. The only evidence was given by Loehr who testified there was no connection. Neither is there any evidence that the Brotherhood, by its action or non-action, was motivated to punish plaintiffs for their opposition to the Brotherhood and its officers.

[7] The 1941 tonnage agreement, the action of the Brotherhood with respect to the April 18, 1950, proposal and the April 21, 1950, letter of Loehr to Nancarrow, the Section 6 notice, and the closing of Philadelphia Transfer, singly or together, did not constitute hostile discrimination.

Cunningham v. Erie R. Co., 2 Cir. 1966, 358 F. 2d 640, relied on by plaintiffs, is not on point. The district court had found that the union was annoyed by plaintiff's

seniority claims and that although the policy of the union was not to proceed against a member for non-payment of dues until he had been delinquent for three months, the union proceeded against the plaintiff when he had only been delinquent for two months. Also the union had been very liberal with other members in accepting payment of dues when the arrearages were more than three months; in fact, there were cases where the arrearages were more than six months. The Court of Appeals upheld the district court's findings that plaintiff's discharge was for reasons "other than the failure of the employes to tender the periodic dues * * * uniformly required as a condition of acquiring or retaining membership".

[8] The Brotherhood has raised the statute of limitations as a defense. The Pennsylvania six-year statute of limitations applies. Falsetti v. Local 2026, UMW, D.C., 249 F. Supp. 970, aff'd 3 Cir. 1966, 355 F. 2d 658. See also International Union, UAW v. Hoosier Cardinal Corp., 1966, 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 2d 192. 12 P.S. §31. The Brotherhood contends the statute started to run (a) as to Central Region rates on April 21, 1950, or at the latest on October 10, 1950, when the Railroad rejected the proposal, and (b) as to the abolition of tonnage on June 29, 1952, when Philadelphia Transfer was closed or at the latest on July 21, 1952, when the Railroad served notice it was closing its files. Plaintiffs contend that the duty of fair representation continued until the first action was brought in 1959, and it was only then that the right of action accrued. Plaintiffs cite Falsetti v. Local 2026, UMW, supra.

Plaintiffs' construction of Falsetti is erroneous. On January 8, 1954, Falsetti was furloughed and his job given

to an employee with less seniority. In August, 1956, he sued the union in the state court alleging a breach of the duty of fair representation in not processing his grievance. He was unsuccessful. In November, 1963, he brought an action in two counts in federal court; the first alleged a breach of the duty of fair representation; the second, brought under Section 301 of the Labor Management Relations Act, 29 U.S.C.A. §185, alleged a conspiracy between the union and employer in violation of the collective bargaining agreement. The district court found that the Section 301 claim accrued in January 1954, when plaintiff was furloughed, and that the breach of the duty of fair representation accrued *sometime between* January 1954 and August 1956. The Court of Appeals affirmed. Neither the district court nor the Court of Appeals indicated that the count based on breach of the duty of fair representation accrued on the filing of the state court action; rather, it accrued "sometime between" the date of the discharge and the date of the state court action. The district court specifically rejected any theory of a continuing cause of action:

> "* * * While the evidence is such that it is more difficult to pinpoint the date that his cause of action for the Union's alleged breach of its duty of fair representation accrued, this had to be by August 6, 1956, when he commenced the state court action and asserted such a breach in his complaint filed therein. The evidence does not substantiate plaintiff's contention that the defendants assumed any *continuing* obligations, duties or relationship toward the plaintiff after that date (and certainly not after September 11, 1956, when he was notified of his ex-

pulsion from the defendant Union). We do not believe that a plaintiff has a perpetual right to sue for violation of a fiduciary duty on the theory that, once undertaken, the fiduciary's duty and the fiduciary relationship last evermore—particularly when the suit is an action at law for damages. See: Sherwin v. Oil City National Bank, 229 F. 2d 835 (3d Cir. 1956). In short, we are convinced that the statute of limitations has run on plaintiff's claims." (Footnote omitted.)

In affirming, the Court of Appeals stated:

"* * * As an alternative to the latter proposition appellant submitted that the breach of the appellees' obligations, as charged, was of a continuing nature and so within the limitations period. * * *

"The District Court's rejection of appellant's contention that the state statute of limitations was tolled by the commencement of the state suit is amply supported by the law; so with appellant's continuing cause of action theory. * * *" (Footnotes omitted.)[6]

The reason for the "sometime between" holding in Falsetti is clear. When a member is aggrieved by a discharge, he has a right to expect that the union will represent him fairly in processing his grievance. Ordinarily, at the date of his discharge, he would have no reason to believe that the union would fail in its duty. There comes a time,

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[6] One case, Brotherhood of Locomotive Firemen v. Mitchell, 5 Cir. 1951, 190 F. 2d 308, appears to hold that the duty undertaken by a union is a continuing one and limitation does not run against it. This case cites no authority, and has never been cited for this proposition. It is contrary to what has been said above and will not be followed.

however, when he determines, or should determine, that he is not being represented fairly. It is at that time that the cause of action accrues. Falsetti, by filing the state action, charged that he was not being represented fairly and thus he established the latest date at which the cause of action could accrue. Since that date was more than six years before the institution of the federal action, it was unnecessary for the court to determine whether the action had accrued at an earlier time. In the language of Judge Freedman in Daniels v. Beryllium, E.D. Pa. 1964, 227 F. Supp. 591, "the statute of limitations did not begin to run until plaintiffs, by the exercise of reasonable diligence, could have discovered * * * the * * * condition was caused by [defendant] * * *." Cf. Tobacco & Allied Stocks, Inc. v. Transamerica Corp., 3 Cir. 1957, 244 F. 2d 902.

[9, 10] When did plaintiffs know, or when should they have known, they were not being represented fairly? Complaints against tonnage started in 1942 and continued until Philadelphia Transfer was closed. If there was a violation of the duty of fair representation, plaintiffs were apprised of it long before the events leading up to the mass meeting in January 1954, and the revocation of the charters. It is not necessary to detail the evidence to pinpoint the exact date because it is clear that at the very latest plaintiffs knew or should have known of any violation when the order of the Supreme Court of Pennsylvania upholding the revocation of the charters was handed down on February 6, 1956, more than six years prior to the filing of the present action.[7] In the counterclaim filed

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[7] In their brief plaintiffs state:

"All the exhibits reveal agitation for change in the Tonnage agreement commenced in the early World War II years."

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in that action, sworn to by Zawada, defendants alleged: the "* * * illegal, improper and harmful actions and derelict failure to act of the Brotherhood, its agents and appointees, including S. V. W. Loehr, General Chairman, George M. Harrison, Grand President, and L. B. Snedden, Grand Vice President," in failing, among other things, to

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"Before the union shop agreement of 1952, the Grand President was made acutely aware of the fact that members of the Philadelphia locals were in an uproar over the negligence of Mr. Loehr in the handling of the tonnage negotiations among other things." * * *

"This [The Butler Street Agreement—January 21, 1954] was the fuse which blew the powder keg." * * *

"Thus with the aid of the Supreme Court of Pennsylvania, Grand President Harrison achieved the supreme result: the Pennsylvania Railroad was rid, once and for all of the 'persistent and vocal demands' of Zawada and his Protective Committeemen. Moreover, the carrier was rid of Zawada who filed between 225 and 300 claims per month against them for contract violations. * * * And the union was free finally (after being harassed from 1941 to 1956) of Zawada and his group's demands that the upper echelons of this union do something with respect to tonnage and equalization of pay.

"Revocation of the charters of the locals and expulsion and/or suspension of the leaders of the revolt brought silence on the Eastern Region after fifteen years of correspondence, conferences, charges and counter-charges of dereliction of duty.

"The full circle of discrimination was completed. Not only were the demands for negotiation of an equalization of rates for Tallymen aborted, but the people and their leaders lost their political strength within the union to do anything about it: their charters and hence their votes were destroyed; and their leaders lost their positions within the union. Peace reigned once more on the Pennsylvania Railroad. 'The persistent and vocal complaints' of Thompson v. Brotherhood (supra) were silenced but for this lawsuit."

obtain wage rates for tallymen comparable with tallymen in the Central Region, to effectuate Award 4292 and Award 4291, and to process and demand payment of the 1944 wage increase. In the same pleading defendants alleged that the revocation of the charters "was in violation of natural justice, that such action was arbitrary and capricious and that the real purpose and attempt of the Brotherhood and of its national officers, servants and agents, is to punish Joseph P. Zawada for his loyal, aggressive and vigorous representation over a period of 12 years as Division Chairman, of the membership of the defendant lodges and all other local lodges on the Philadelphia Terminal Division * * *." There is no indication that the Brotherhood assumed any obligation after the revocations, and as the court found in Falsetti, "we do not believe that a plaintiff has a perpetual right to sue for violation of a fiduciary duty on the theory that, once undertaken, the fiduciary's duty and the fiduciary relationship last evermore * * *."

[11] A few additional matters deserve mention. This action is primarily one at law for damages for the breach of the duty of fair representation and conspiracy although certain equitable relief by way of a mandatory injunction is also requested. To the extent that laches controls, rather than the statute of limitations, equitable relief is also barred. In Russell v. Todd, 1940, 309 U.S. 280, at page 289, 60 S. Ct. 527, at page 532, 84 L. Ed. 754, the Court said:

> "Even though there is no state statute applicable to similar equitable demands, when the jurisdiction of the federal court is concurrent with that of law, or the suit is brought in aid of a legal right, equity will

withhold its remedy if the legal right is barred by the local statute of limitations. * * *"

Moreover, even when an action is deemed solely one in equity, while a statute of limitations is not controlling, it is drawn upon for the light it may shed on whether a plaintiff has inexcusably slept on his rights so as to make a decree against a defendant unfair. Cf. Holmberg v. Armbrecht, 1946, 327 U.S. 392, 396, 66 S. Ct. 582, 90 L. Ed. 743.

Thus, whether the present action is in equity, or is one for equitable relief in aid of a legal right, the action is barred. As stated by the Court of Appeals in Falsetti v. Local 2026, UMW, supra, "If laches had been the basis for [the district court's] dismissal, the record's reflection of appellant's extensive delay would also have supported such a ruling."

The first action filed in 1959, and the second filed in 1960 did not toll the statute insofar as the claim of breach of duty of fair representation is concerned. During the pendency of these actions the period of limitation continued to run, and after it had expired no new action could be maintained in the absence of a savings provision. Counsel have cited no statute and the orders of dismissal contain no provision which permitted the filing of a new action after the dismissal even though the period of limitations had run. Cf. Di Sabatino v. Mertz, M.D. Pa. 1949, 82 F. Supp. 248; Falsetti v. Local 2026, UMW, supra.

[12] Plaintiffs argue that during negotiations Alexander made a counter-proposal to equalize Eastern Region rates with Central Region rates, which, under Broth-

erhood of Locomotive Firemen v. Mitchell, 5 Cir. 1951, 190 F. 2d 308, represented discrimination prohibited by the Railway Labor Act because the counter-proposal would have eliminated discrimination and was not accepted by the Brotherhood, and since the fact of the counter-proposal was unknown to plaintiffs until Alexander's testimony, the bar of the statute of limitations and laches is lifted, citing Pennsylvania Co. for Ins. v. Ninth Bank & Trust Co., 1932, 306 Pa. 148, 155, 158 A. 251. It is not necessary to discuss these principles because Alexander did not make a counter-proposal which would have eliminated discrimination. He could not remember if he offered more money than tallymen would have earned under the existing agreement, although some would have recieved more and some less. He refused to say he had offered rates prevalent in the Central Region.[8]

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[8] Cross-examination by Mr. Richette:

"Q. So that now we have that you offered him three rates prevalent in the Central Region, but that you at the same time also wanted to eliminate all of the other rates but three in the Central Region?

A. (Mr. Alexander) That's right, three rates in the Central Region. Whether they were the then prevailing rates or not, I will not say. There were three rates that I proposed. Now, how I arrived at them, I don't recall that.

* * * * * * * *

Q. Now, what I am trying to get at, Mr. Alexander, is this: You said you certainly knew in dealing with labor that they are not about to give up anything they had already earned, they had worked hard to get that 1941 agreement, apparently, which gave them incentive pay, and you didn't want to give, according to your testimony, you didn't want to give Mr. Loehr the $269.17 paid out in Pittsburgh, but you said you were ready to give them in lieu of the tonnage the three prevalent rates in the Central Region.

The other defenses need not be considered.[9]

Judgment will be entered in favor of the Brotherhood and against plaintiffs.

Now, I want to ask you—

A. I wish you would stop paraphrasing my testimony.

THE COURT: Yes. That is not the testimony, Mr. Richette.

MR. RICHETTE: He wanted to give them three rates.

THE COURT: That is different.

MR. RICHETTE: On the Eastern Region—

THE COURT: That is different than three prevalent rates. Go ahead.

MR. RICHETTE: Three of the seven, shall we say, of the seven or eight—

THE COURT: That is still not his testimony.

BY MR. RICHETTE:

Q. How many rates were in existence in Pittsburgh?

A. I said about nine, as near as I can recall.

Q. All right. Three of those nine you wanted to give him.

A. Not necessarily. I said three rates.

Q. Three rates.

A. Which could have been rates that I grabbed out of the air and figured out for my own purposes. It could have been entirely different from any of the existing rates, if I thought that was a good round-figure rates."

[9] The Brotherhood did not defend on Rule 41(b), "Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits." (Amended in 1966 to delete "lack of an indispensable party" and substitute the phrase "failure to join a party under Rule 19".) See American Nat. Bank & Trust Co. v. United States, 79 U.S. App. D.C. 62, 1944, 142 F. 2d 571; Bartsch v. Chamberlin Co. of America, 6 Cir. 1959, 266 F. 2d 357.

APPENDIX D

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45 §152

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

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45 §155

Functions of Mediation Board—Disputes within jurisdiction of Mediation Board

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

45 §156

Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

45 §183

Disputes within jurisdiction of Mediation Board

The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation

Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

The services of the Mediation Board may be invoked in a case under sections 181-188 of this title in the same manner and to the same extent as are the disputes covered by section 155 of this title, May 20, 1926, c. 347, §203, as added April 10, 1936, c. 166, 49 Stat. 1189.

SUPREME COURT, U. S.

MAR 26 1969

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1103

JAMES A. GAINEY and J. L. YOUNG
Individually and on Behalf of Others Similarly Affected,
Petitioners

v.

THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES AND THE PENNSYLVANIA RAILROAD COMPANY

BRIEF IN OPPOSITION

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Steamship Clerks, etc.

March 25, 1969

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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THE BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES AND THE PENNSYLVANIA RAILROAD COMPANY

BRIEF FOR RESPONDENT BROTHERHOOD

QUESTIONS PRESENTED FOR REVIEW

Whether the Trial Court (affirmed by the Court of Appeals) correctly applied to the facts proved of Record, the rules of fair representation declared by this Court in *Steel* v. *Louisville and Nashville Ry.*, 323 U.S. 192 and elaborated in subsequent decisions, notably *Vaca* v. *Sipes*, 386 U.S. 171, and the earlier decisions in this controversy, *Gainey* v. *Pennsylvania Railroad*, 275 F. 2d 342, (cert. denied 363 U.S. 811), and *Gainey* v. *Brotherhood*, 313 F. 2d 318.

Whether the Court has the power to (and if it does have the power, whether it should) order the Brotherhood to submit to mediation a dispute, now seventeen years old, which the Brotherhood, in good faith, decided to be without merit.

STATEMENT OF THE CASE

This is a class suit, filed in behalf of a group of freight house workers known as tallymen employed in Philadelphia against their union and their employer, the Pennsylvania Railroad. The claim against the union is based on alleged breach of its duty of fair representation. The claim against the Railroad (which was not pursued in the lower courts, although not abandoned) is based upon alleged conspiracy with the union to deprive plaintiffs of their rights. Both claims are based upon an alleged agreement between the union and the railroad to increase the wages of tallymen in the Eastern Region of the Railroad (east of Altoona Pa.) to the level of those paid in Pittsburgh and the Central Region.

This "agreement" was an informal conversation on the main floor of 30th Street Station, Philadelphia, between the union's general Chairman and a subordinate officer of the Railroad, on April 18, 1950, confirmed by a letter from the union to a higher officer of the Railroad dated April 21, 1950. The gist of the proposal was that the Brotherhood would agree to the abolition of "tonnage" pay at Philadelphia Transfer if the Railroad would increase the pay scale in the whole Eastern Region to that paid in the Central Region, particularly at the Pittsburgh Eleventh Street Station. The higher officers, after studying the proposal refused to accept it. The Brotherhood nevertheless pushed the proposal for something over two years. In the course of these negotiations it was found that there were a number of different rates (estimated at nine) in the Central Region. Pittsburgh Eleventh Street was the highest. The Railroad representative suggested that three sets of rates (depending on the size of the station) be established in both regions. This would have meant advances for some men, reductions for others. The suggestion was rejected by the Brotherhood's representative.

Philadelphia Transfer was a facility for the transfer of less-carload freight from car to car and platform to car. At Philadelphia Transfer, but not elsewhere in Philadelphia or in the Eastern Region (except Trenton, New Jersey) there was an incentive arrangement known as "tonnage". Under this arrangement gangs which moved more than a specified tonnage a day received a bonus. About 15% of the tallymen earned a bonus. The other 85% were paid hourly rates, as were the tallymen elsewhere.

On June 29, 1952 the Railroad abandoned Philadelphia Transfer and transferred the tallymen and other freight handlers to other stations. Both the plaintiffs and the System representatives of the Brotherhood co-operated in facilitating the transfers. Plaintiffs' representative expressed satisfaction with the handling of the changeover at the time; no one suggested that an injunction against the Railroad be sought.

In July 1952 the Railroad advised the Brotherhood that the proposal to increase the wages of Eastern tallymen to Pittsburgh rates was dead. The responsible officers of the Brotherhood, after considering the matter, decided not to go to mediation. This decision was made in good faith as the Trial Court, on abundant evidence, found. (App. p. 49)

In 1959 Plaintiffs brought a suit in the Federal Court based on this, the tallymen's, dispute. Upon motion to dismiss the lower court found that there was no agreement between the Brotherhood and the Railroad in this matter. *Gainey* v. *Pennsylvania Railroad et al,* 177 F. Supp. 421. The Court of Appeals affirmed, 275 F. 2d 342. This Court denied certiorari, 363 U.S. 811. *(First Gainey)*

Thereafter Plaintiffs brought a second suit based on the same cause of action but with broader averments. The District Court, on motion, dismissed the complaint.

The Court of Appeals again affirmed, holding that there was no agreement and that Plaintiffs had not sufficiently averred a violation of the Brotherhood's duty of fair representation. *Gainey* v. *Pennsylvania Railroad, et al,* 313 F. 2d, 318. *(Second Gainey)*

In 1963 Plaintiffs filed this, the *Third Gainey* case, on averments still broader than those of *Second Gainey.* This case was tried without jury by a judge who gave plaintiffs the broadest latitude to prove hostile discrimination, not only in the tallymen dispute but in a variety of other matters. He found that there was no prejudicial action by the Brotherhood. *Gainey* v. *Brotherhood of Railway and Steamship Clerks, et al.* 275 F. Supp. 292, Appendix p. 21. The Court of Appeals affirmed (Appendix p. 17) and denied Rehearing (Appendix p. 20).

ARGUMENT

(As an addendum to this brief we note statements in the petition which we believe to be unsupported in the record.)

The basis of the petition is that the lower courts did not correctly apply to the facts of this case the rule of fair representation enunciated by this Court in *Steele* v. *Louisville and Nashville Ry.* 323 U.S. 192, and elaborated in subsequent opinions. Petitioners also suggest that the application of this principle to the facts of this case in *Second Gainey* was a "narrow concept of the prohibited discrimination."

We submit that the criteria defined by the Court of Appeals in *Second Gainey* were correct. On this petition, however, we assume that this Court will apply the standards set up in its own opinions. We submit that the courts below correctly applied to the facts of this case the rules laid down by this Court in *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, *Humphrey* v. *Moore,* 375 U.S. 335, and, especially, *Vaca* v. *Sipes,* 386 U.S. 171.

Petitioner argues that "giving monthly salaries to Central Region tallymen, and lower hourly rates to Eastern Region tallymen**** is the rankest type of discrimination." (Petition, p. 12)

> "Inevitably differences arise in the manner and degree to which the terms of any negotiated agreement affect individual employees and classes of employees. *The mere existence of such differences does not make them invalid.* The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargainning representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion." (emphasis added)
> *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338.

The evidence shows that there were from three to nine different scales of wages in the Central Region and differences in the complexity of the operations and in the duties of tallymen, especially as to the clerical work done at different locations.

> "Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes. Nor should it be neutralized when the issue is chiefly between two sets of employees. Conflict between employees represented by the same union is a recurring fact. To remove or gag the union in these cases would surely weaken the collective bargaining and grievance process."
> *Humphrey* v. *Moore,* 375 U.S. 335, 349-350.

Petitioner contends that refusing to invoke the machinery of mediation is in itself discrimination. (Petition, p. 12) Not so, said the lower courts; the inaction must be

"motivated by bad faith, for the gravamen of the rule is 'hostile discrimination' ". (App. c, p. 38)

> Not so, said this Court in *Vaca*.
> "A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."
> *Vaca* v. *Sipes*, 386 U. S. 171, 190

In *Vaca* the employee proved that his case, which the union had refused to push to arbitration, actually did have merit, but this Court held that that did not give a cause of action in the absence of bad faith.

> "Having concluded that the individual employee has no absolute right to have his grievance arbitrated under the collective bargaining agreement at issue, and that a breach of the duty of fair representation is not established merely by proof that the underlying grievance was meritorious, we must conclude that that duty was not breached here."
> *Vaca* v. *Sipes* supra.

In this case the Plaintiffs did not even prove that their claim was meritorious; the case rested on an alleged "agreement" which, often labored at the trial, turned out to be no agreement at all.

Petitioners also urge that the Court should compel the union to invoke mediation. (Petition, p. 14) In the absence of proof of bad faith, the Court has no such power. As this Court said in Vaca,

> "If the individual employee could compel arbitration of his grievance regardless of its merit, the settlement machinery provided by the contract would be substantially undermined, thus destroying the employer's confidence in the union's authority and returning the

individual grievant to the vagaries of independent and unsystematic negotiation."
Vaca v. *Sipes*, supra, p. 191.

Even if the Court had had the power to compel the union to invoke mediation it would have been a gross abuse of discretion to have done so. In the sixteen years since this problem was laid to rest the Railroad's less-carload freight practices have changed. There is no evidence of the present wage scales in either region, no evidence of how much, *if any*, of the less-carload freight still moves on rails, where and by what processes this traffic, to the extent it may still exist, is handled. The evidence does show that Pittsburgh Eleventh Street Station (equalization with which is the very core of Plaintiffs' demands) was abandoned years ago.

CONCLUSION

That this case is of interest only to the parties, and presents no problems of importance to others, is implicit in this Court's refusal of certiorari in *First Gainey*, 363 U.S. 811. After twice dismissing the suit on motion, the lower courts gave Plaintiffs a chance to prove their averments. Plaintiffs made no attempt to prove the more lurid allegations and failed miserably to prove any conspiracy or hostile discrimination. The issue is factual, not legal; the proven facts have been carefully measured by the lower courts against the standards set up by this Court.

The petition should be dismissed.

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Attorney for Respondent Brotherhood of Railway and Steamship Clerks, etc.

ADDENDUM

Comments on Statements in the Petition which are Believed to Lack Support in the Record

1. "* * the Brotherhood's General Chairman testifies that he reached an agreement with the *carrier* to increase the pay of petitioners * * " (p. 3) (emphasis added)

   "* * the agreement which the General Chairman testifies had been reached * * " (p. 3)
   Similar statements appear on pages 5, 6, 12.

The Brotherhood's General Chairman testified that his conversation was with a minor official of the Railroad, and that the responsible officers refused to ratify the arrangement. Plaintiffs' contention in the trial court was that the account given by three witnesses, supported by a written minute, was all perjury. The trial Judge refused to accept this fantastic version. (Appendix pp. 32-34).

2. " * * so that it would equal that of other workers, in another area, *doing the same work* * * " (p. 3 emphasis added)

   " * * fellow workers doing the same work * * " (p. 3)
   Similar statement at p. 13.

The Plaintiffs testified that the work at Pittsburgh Eleventh Street was the same as at Philadelphia Transfer; Defendant's testimony showed substantial differences in the operation and in the duties of tallymen. There is no evidence of work duties elsewhere in the Central or in the Eastern Region.

3. " * * the carrier * * * terminates the collective bargain in force * * " (p. 3)
   A similar statement appears on page 6.

The carrier abandoned the only station at which incentive pay was applicable.

4. "* * * tallymen, ninety percent of whom are Negroes * *" (p. 4)

The record shows that whites and blacks were employed as tallymen, both in Philadelphia and in Pittsburgh. It does not show the percentage at either station.

5. "On the Eastern Region about fifteen percent of the tallymen were operating under an incentive program called "Tonnage Agreement**" (p. 5)

The evidence is that *all* of the tallymen at Philadelphia Transfer, and *none* of the tallymen elsewhere in the Eastern Region were operating under "Tonnage"; that fifteen percent of the tallymen at Philadelphia Transfer *earned* bonus pay, and the other eighty-five percent did not.

6. "*To this day* tallymen on the Eastern Region are still paid at an hourly rate and receive less money than their Central Region counterparts" (p. 8, emphasis added)

The evidence concerned only the pay schedule in the 1950's. We cannot state the actual situation today without going outside the record.

7. "Thus the plaintiffs who have lost to date more than five million dollars in earnings**" (p. 9)

At plaintiffs' suggestion the Court did not go into the matter of earnings, and there is no evidence on the point.